

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

VERNON L. CURRY, JR.

Appellant.

No. 49026-9-II

UNPUBLISHED OPINION

SUTTON, J. — A jury found Vernon Lewis Curry, Jr. guilty of one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm. Curry appeals, arguing that the trial court erred by (1) denying his motion to dismiss based on government misconduct, (2) denying his motion for a mistrial based on improper opinion testimony, (3) admitting improper impeachment evidence, and (4) refusing to instruct the jury on the lesser included offense of first degree manslaughter. Curry also argues that the prosecutor committed misconduct during closing argument by improperly vouching for the credibility of its witnesses and relying on evidence outside the record.

The trial court did not err by denying Curry's motion to dismiss, motion for a mistrial, or request for an instruction on the lesser included offense of first degree manslaughter. Curry waived

his argument regarding improper impeachment evidence. And, Curry's prosecutorial misconduct claim fails. Accordingly, we affirm.¹

FACTS

At approximately 4:00 AM on September 7, 2014, Michael Ward, Jr. was shot and killed in his car near an after-hours club in Tacoma. Curry was arrested for Ward's murder. The State charged Curry with one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm.²

Curry moved to dismiss the charges based on government misconduct. Curry alleged that the elected Pierce County prosecuting attorney's behavior toward his prior appointed counsel undermined the relationship between Curry and his former counsel. Curry relied on a declaration filed by his former attorney. Curry's former counsel stated that the Pierce County prosecuting attorney had referred to him as a member of a "confederacy of dunces." Clerk's Papers (CP) at 155. And "the 'dunces' were not to receive favorable consideration in the negotiation and settlement of criminal cases." CP at 155.

Curry saw the "confederacy of dunces" comment reported in a newspaper article and became concerned about his former counsel's ability to represent him. Ultimately, Curry became so concerned about his former counsel's ability to represent him that his former counsel felt it was appropriate to withdraw. Curry's former counsel explained,

¹ Curry also asks that we decline to impose costs on appeal. If the State chooses to file a cost bill on appeal, Curry may then object, and a commissioner of this court may determine whether imposition of costs is warranted. RAP 14.2. Accordingly, we do not address whether to impose costs on appeal.

² RCW 9A.32.030(1)(a); 9.94A.533(3); 9.41.040(1)(a).

Deputy Prosecuting Attorney Jesse Williams was representing the state at the time that I withdrew from representing Mr. Curry. I informed Mr. Williams of the situation and my decision to withdraw, and also informed Mr. Williams that I did not believe I had been treated unusually or unfairly by him. However, I expressed to him my client's concern was the reason for my withdrawal.

CP at 156.

The trial court concluded that Curry did not have the right to choose his appointed attorney and denied his motion to dismiss. Curry proceeded to trial with the counsel appointed to him following his former counsel's withdrawal.

Isaiah Campbell and Xavior Henderson were both near the after-hours club on the night Ward was shot and killed. Campbell testified that he was standing outside the club when he heard several gunshots from nearby. Then Campbell saw Ward's car backing up. When Campbell approached Ward, he realized that Ward had been shot several times and was struggling to breathe. Campbell grabbed a gun from out of Ward's car and fired several shots toward a car coming up the street. Henderson testified that when he heard gunshots, he immediately began running. As Henderson was running, he fired three shots toward a brick wall.

Sandra Blanchard lived a few blocks from where the shooting occurred. Several hours after the shooting, Blanchard and one of her neighbors, Korlina Henson, found a black ski mask in her yard. A crime scene technician was notified and collected the black ski mask. Forensic testing found Curry's DNA on the inside front of the ski mask. Curry's own expert agreed with the forensic findings, but also found an unidentifiable second profile on the outside back of the ski mask.

Several days after the shooting, Henson found a firearm in her yard. The firearm was collected by a forensic specialist. Forensic testing confirmed that the firearm was the murder weapon.

Detective Jeff Katz of the City of Tacoma Police Department was the lead investigator assigned to Ward's murder. Detective Katz reviewed security video footage of the area surrounding the murder from several sources. One video showed a man in gloves pulling a ski mask down over his face while walking toward the murder scene. And another video showed what appeared to be the same subject firing a gun in the direction of Ward's car.

During Detective Katz's testimony, the following exchange took place:

[STATE]: Starting first with the total number of shooters. Were you able to identify the total number of people that had been discharging a firearm that night?

[KATZ]: Yes, sir.

[STATE]: How many?

[KATZ]: Three.

[STATE]: One of those people was the person involved in killing Mr. Ward. Is that right?

[KATZ]: Correct.

[STATE]: Second person, identity of that person was who?

[KATZ]: Isaiah Campbell.

[STATE]: And the identi[t]y of the third person was who?

[KATZ]: Xavier Henderson.

[STATE]: Looking over the entirety of the investigation, did you develop any evidence that Isaiah Campbell had in any way been involved in the murder of Michael Ward?

[DEFENSE COUNSEL]: Your Honor, I'm going to object to this line of questioning, as to opinion as to guilt.

[COURT]: I'm going to overrule the objection.

[STATE]: Looking at the totality of your investigation, are you aware of any evidence that suggested Isaiah Campbell had been involved in the homicide of Mr. Ward?

[KATZ]: No.

[STATE]: Question same for Mr. Henderson. Are you aware of any evidence that suggests - -

[DEFENSE COUNSEL]: Same objection.

[COURT]: Overruled.

[STATE]: Are you aware of any evidence that suggested Mr. Henderson had been involved in the homicide of Mr. Ward?

[KATZ]: No.

XII Report of Proceedings (RP) at 1237-39. The trial adjourned for four days. When the trial resumed, Curry moved for a mistrial based on Detective Katz's allegedly improper opinion testimony. The trial court denied Curry's motion. However, the trial court agreed to give a curative instruction before resuming Detective Katz's testimony. Prior to resuming Detective Katz's testimony, the trial court gave the following instruction:

The jury is the sole judge of credibility and the facts. The jury will disregard any opinion testimony from Detective Jeff Katz as [to] the involvement of Isaiah Campbell and Xavior Henderson in the September 7, 2014, shooting of Michael Ward. Such testimony is stricken.

XIII RP at 1282.

Curry testified in his own defense. Curry explained that he had a media company called Ylyfe Entertainment. As part of a photo shoot for Ylyfe, Curry wore a black ski mask similar to the one worn by the shooter and found in Blanchard's yard. However, Curry testified that the mask was in a container that was stolen from his car months prior to the shooting. During Curry's cross-examination, the State asked Curry if he had ever heard of YG Entertainment or Young

Gangster Entertainment. Curry denied hearing of YG Entertainment or Young Gangster Entertainment.

In response to Curry's testimony, the State moved to introduce two photographs showing Curry associated with Y Gangster Entertainment (Exhibit 174A) and a photograph with Curry displaying the logo for Y Gangster Entertainment (Exhibit 175). Curry objected. The trial court admitted Exhibit 174A as "direct impeachment for what he just testified to." XV-XVI RP at 1595. Then the trial court admitted Exhibit 175 "because [Curry] denied that that was the symbol for Y Gang and it's obvious that it is." XVII RP at 1705.

Prior to presenting the photographs, the State proposed a limiting instruction that informed the jury that the photographs and associated line of questioning may be considered "for assessing the defendant's credibility and for no other reasons." XVII RP at 1686. However, Curry specifically stated that he did not want the trial court to give the proposed instruction. Therefore, the trial court did not give the jury a limiting instruction regarding the Y Gangster Entertainment evidence.

The trial court instructed the jury on first degree premeditated murder and second degree intentional murder. Curry also proposed the lesser included offense instructions for first degree manslaughter. The trial court refused to give the lesser included offense instructions for first degree manslaughter, ruling that the evidence did not support a finding that the shooter acted recklessly.

During closing argument, the prosecutor made the following statements,

And then our professional witnesses are very similar, okay, like police officers, forensics technicians. DNA folks. These people -- it's their job to show up and do work in criminal investigations. They came in, they don't have any

interest in the case, they don't have any bias. They just came in and told you what happened. Okay.

XVII RP at 1792. Curry did not object to any of the prosecutor's statements. And during rebuttal argument, the prosecutor stated,

DNA in this day and age has great power. You hear about it all the time. Innocence Project, evidence that's tested, new DNA, evidence that couldn't be tested ages ago that's now re-tested and we learn that the person that's been incarcerated isn't the man who committed the crime. It has the power to exonerate. It has just as much power to convict.

XVII RP at 1821-22. Curry did not object.

The jury found Curry guilty of one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm. The trial court imposed a high-end, standard range sentence of 450 months on the first degree murder conviction. The trial court also imposed a mandatory 120 month firearm enhancement to run consecutively. Curry appeals.

ANALYSIS

I. MOTION TO DISMISS—GOVERNMENTAL MISCONDUCT

Curry argues that the trial court erred by denying his CrR 8.3 motion to dismiss. We disagree.

We review a trial court's decision on a CrR 8.3(b) motion to dismiss for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Michielli*, 132 Wn.2d 240. CrR 8.3(b) states,

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

To grant a CrR 8.3(b) motion to dismiss, the trial court must find (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The governmental misconduct at issue need not be evil or dishonest, simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Here, Curry argues that the Pierce County prosecuting attorney's attitude toward his former counsel undermined his former counsel's representation, and left his former counsel with no choice but to withdraw. But Curry has not demonstrated any conduct by the State that prejudiced his right to a fair trial. Curry, relying on his former counsel's declaration, alleged that the elected Pierce County prosecuting attorney referred to his former counsel as part of a "confederacy of dunces" and that the prosecuting attorney stated that the "confederacy of dunces" would not receive favorable negotiations. CP at 155. However, Curry's former counsel acknowledged that he had not been treated unfairly by the deputy prosecutor handling the case. And Curry's former counsel withdrew of his own accord.

Furthermore, we note that "indigent defendants with appointed counsel do not have the right to their counsel of choice." *State v. Hampton*, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015). Curry has not shown any actual prejudice resulting from his former attorney's withdrawal. Accordingly, Curry has failed to demonstrate that the State engaged in conduct that prejudiced his right to a fair trial.

Because the State did not engage in conduct that prejudiced Curry's right to a fair trial, the trial court did not abuse its discretion by denying Curry's motion to dismiss based on government misconduct.

II. MOTION FOR A MISTRIAL—IMPROPER OPINION TESTIMONY ON GUILT

Curry argues that the trial court erred by denying his motion for a mistrial based on Detective Katz's improper opinion testimony. We disagree.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. *Emery*, 174 Wn.2d at 765. Appellate courts determine whether a mistrial should have been granted by considering (1) the seriousness of the trial irregularity, (2) whether the trial irregularity involved cumulative evidence, and (3) whether a proper instruction to disregard cured the prejudice against the defendant. *Emery*, 174 Wn.2d at 765. We give deference to the trial court because the trial court is in the best position to discern any prejudice. *State v. Garcia*, 177 Wn. App. 769, 777, 313 P.3d 422 (2013).

Here, the alleged irregularity is Detective Katz's testimony that there was no evidence indicating that Campbell or Henderson were responsible for Ward's death. Opinion testimony as to the guilt of the defendant invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). To determine whether testimony is an improper opinion on guilt, we consider,

“(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.”

Kirkman, 159 Wn.2d at 928 (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Considering these factors, we hold that Detective Katz’s testimony was an improper, although weak, opinion on guilt. Here, Detective Katz’s testimony contains the implication that Curry was guilty if the State’s premise that Curry was the man in the black ski mask is true. Detective Katz’s opinion, although weak, was improper.

However, a proper instruction to disregard improper opinion testimony cures any prejudice against the defendant. *See State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the trial court gave a curative instruction. The instruction informed the jurors that they should “disregard any opinion testimony from Detective Jeff Katz as [to] the involvement of Isaiah Campbell and Xavior Henderson in the September 7, 2014, shooting of Michael Ward.” XIII RP at 1282. Therefore, the trial court properly instructed the jury to disregard Detective Katz’s improper opinion testimony and the instruction cured any prejudice.

Although Detective Katz’s improper opinion testimony constitutes a trial irregularity, it was cured by the trial court’s instruction to disregard the opinion testimony. Accordingly, the trial court did not abuse its discretion by denying Curry’s motion for a mistrial.

III. IMPROPER IMPEACHMENT EVIDENCE

Curry argues that the trial court erred by admitting evidence regarding his association with Y Gangster Entertainment. However, we hold that Curry waived his challenge to the admission of the Y Gangster Entertainment evidence.

Curry has waived his challenge to the admission of evidence regarding Y Gangster Entertainment by refusing a limiting instruction. “When an error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested.” *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991).

Curry argues that the Y Gangster Entertainment evidence was prejudicial because it allowed the jury to believe that Curry was involved in gang culture. If the jury had been given the limiting instruction that the State proposed, the prejudice Curry complains of would have been cured because the jury would not have considered the evidence for any purpose other than credibility. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (We presume the jury follows the trial court’s instructions.).

Because the prejudice could have been cured by a limiting instruction that Curry explicitly refused, he has waived the error on appeal. Therefore, we decline to address whether the trial court erred by admitting evidence of Curry’s association with Y Gangster Entertainment.

IV. LESSER INCLUDED OFFENSE INSTRUCTION

Curry argues that the trial court erred by refusing to instruct the jury on the lesser included offense of first degree manslaughter. We disagree.

A party is entitled to a jury instruction on a lesser included offense if (1) the elements of the lesser included offense are a necessary element of the charge and (2) the evidence supports an inference that the lesser included offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, the first prong of the *Workman* test is satisfied; first degree manslaughter may be a lesser included offense of premeditated first degree murder. *State v. Warden*, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997). Accordingly, the issue is whether the

evidence supported giving instructions for first degree manslaughter under the second prong. *See Warden*, 133 Wn.2d at 563.

We review the trial court's decision on the second prong of the *Workman* test for an abuse of discretion. *State v. Chambers*, 197 Wn. App. 96, 120, 387 P.3d 1108 (2016). Under the factual prong,

[T]he court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. The evidence must affirmatively establish the commission of the lesser offense; it is not enough that the jury might disbelieve the evidence pointing to guilt. If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. In determining whether the evidence supports an inference that the lesser crime was committed, we review the evidence in the light most favorable to the party requesting the instruction.

Chambers, 197 Wn. App. at 120 (citations omitted) (internal quotation marks omitted).

A person is guilty of first degree manslaughter when he or she recklessly causes the death of another person. RCW 9A.32.060. "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

Here, the evidence did not affirmatively establish that the person who caused the death acted recklessly. The evidence established that the person who shot and killed Ward walked directly down the street with a gun and emptied the ammunition clip into Ward's body while wearing a mask to disguise his identity. Therefore, the evidence presented at trial establishes that the person who committed the shooting acted intentionally. Because the evidence at trial does not support a jury finding of recklessness, the evidence does not affirmatively establish that the lesser

included offense of first degree manslaughter was committed to the exclusion of the greater charged offense of first degree murder.

Because the evidence does not affirmatively establish that only first degree manslaughter was committed, the trial court did not abuse its discretion by ruling that Curry had not satisfied the factual prong of the *Workman* test. Accordingly, Curry was not entitled to a lesser included offense instruction for first degree manslaughter and the trial court did not err.

V. PROSECUTORIAL MISCONDUCT

Curry argues that the prosecutor committed misconduct during closing argument by making improper remarks bolstering the credibility of DNA evidence based on evidence outside the record and by improperly vouching for police witnesses' credibility. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *Emery*, 174 Wn.2d at 756. First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Emery*, 174 Wn.2d at 760-61. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Emery*, 174 Wn.2d at 760.

However, if a defendant does not object, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial

likelihood of affecting the jury verdict.” *Emery*, 174 Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making a prejudice determination, we “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Emery*, 174 Wn.2d at 762.

Curry argues that the State improperly bolstered the credibility of DNA evidence by relying on evidence outside the record. Curry also argues that the prosecutor improperly vouched for the law enforcement witnesses by arguing that the law enforcement witnesses had no interest in the case and, therefore, they had no bias.

Even assuming that the prosecutor’s comments were improper, Curry did not object at trial and, therefore, he must show that the prosecutor’s comments were so flagrant and ill intentioned that they could not have been cured by an instruction. Curry baldly alleges that the prejudice from the prosecutor’s statements could not have been cured. However, an instruction to disregard the prosecutor’s statements would have cured any prejudice. *See Anderson*, 153 Wn. App. at 428. Therefore, Curry has failed to meet his burden to show that the prosecutor’s conduct was flagrant and ill intentioned. Accordingly, Curry’s claim of prosecutorial misconduct fails.

VI. CUMULATIVE ERROR

Curry also argues that the cumulative error doctrine requires reversal of his convictions. “The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). Here, there were three possible errors in Curry’s trial: (1) improper impeachment evidence, (2) improper vouching during closing argument, and (3) improper bolstering of the value of DNA evidence. However, even when taken

together, the errors did not deprive Curry of a fair trial. Accordingly, the cumulative error doctrine does not require reversal.

We affirm Curry's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


LEE, A.C.J.


WORSWICK, J.